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In The
Supreme Court Of The United States

October Term, 2000

CORRECTION OFFICER PORTER AND
CORRECTION OFFICER WILLETTE

Petitioners,

v.

RONALD NUSSLE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Did the Court of Appeals erroneously conclude, contrary to other courts of appeals, that an inmate bringing a claim for excessive force need not have exhausted available administrative remedies pursuant to the Prison Legal Reform Act's mandatory exhaustion requirement, 42 U.S.C. § 1997e(a)?

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LIST OF PARTIES

In both the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit, the plaintiff was Ronald Nussle.

In both courts below, the defendants are listed as Correction Officer Willette and Correction Officer Porter.

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IN THE
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OCTOBER TERM, 2000

CORRECTION OFFICER PORTER AND
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Petitioners,

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RONALD NUSSLE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, Correction Officer Porter and Correction Officer Willette[1/] pray that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

1/ The Connecticut Attorney General appeared for both Correction Officer Porter and Correction Officer Willette in their official capacities, to the extent the plaintiff sought relief against state officials, but appeared only for Correction Officer Porter individually inasmuch as it was determined that there was no Correction Officer named Willette.

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Second Circuit entered on August 24, 2000, is reported at *Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000), and is printed in the appendix to this petition at App. A-1.

The memorandum of decision of the United States District Court for the District of Connecticut, *Nevas, J.*, dated November 22, 1999, is unreported, but is printed in the appendix to this petition at App. A-22.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on August 24, 2000. The petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). This petition is filed within ninety days of the Court of Appeals' ruling dated August 24, 2000. Supreme Court Rule 13.1; 28 U.S.C. § 2101(c).

STATUTORY PROVISIONS INVOLVED

[REPRINTED IN APPENDIX]

STATEMENT OF THE CASE

The respondent-plaintiff alleges that on June 15, 1996, while an inmate at the Cheshire Correctional Institute, the petitioners-defendants, acting under color of law, and jointly and in concert with each other, beat him without justification. (Complaint, ¶¶10-11) He claims that the petitioners beat him because he was a friend of Gov. John G. Rowland. (*Id.* ¶9) The respondent further alleges that he "was told that if he reported this beating the guards would kill him." (*Id.* ¶12)

On June 10, 1999, just days before the three year statute of limitations lapsed; *see Williams v. Walsh*, 558 F.2d 667, 670 (2d Cir. 1977); the respondent filed this suit against the petitioners. The respondent's complaint did not allege that he had exhausted his available administrative remedies, and in fact he had not.[2/]

On August 20, 1999, the petitioners moved to dismiss this action for failure to exhaust the respondent's administrative remedies, as required by the Prison Legal Reform Act, of 1995, Pub. L. No. 104-134, 110 State. 1321-73 (1996) ("PLRA"), 42 U.S.C. § 1997e(a). On

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2/ Administrative Directive 9.6, promulgated by the Connecticut's Commissioner of Correction, provides, in pertinent part:

> The following matters are grievable: . . . (3) Individual employee and inmate actions including any denial of access of inmates to the Inmate Grievance Procedure other than as provided herein. . . . (5) Any other matter relating to access to privileges, programs and services, conditions of care or supervision and living unit conditions within the authority of the Department of Correction, to include rights under the Americans With Disabilities Act.

As the District Court determined, and the plaintiff has not contested, the plaintiff never filed a grievance regarding his allegations about the defendants' conduct, although he could have. Rather, he waited 2 years and 50 weeks before filing a federal lawsuit in the first instance. Thus, for purposes of appeal, it must be assumed that if the exhaustion requirement applies to excessive force claims, an administrative remedy was "available" that the plaintiff did not exhaust.

November 22, 1999, the District Court, *Nevas, J.*, granted the petitioners' motion.

The respondent appealed to the United States Court of Appeals for the Second Circuit, which on August 24, 2000, vacated the District Court's judgment and remanded. The Court of Appeals rejected the petitioners' arguments and the District Court's holding, choosing to "distinguish between 'excessive force' and 'prison conditions' claims for purposes of exhaustion under § 1997e(a)" and, contrary to at least two other courts of appeals, "conclud[ing] that exhaustion of administrative remedies is not required for claims of assault or excessive force brought under § 1983." *Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000).[3/]

3/ The District Court had also rejected the respondent's argument that the PLRA's exhaustion requirement did not apply to his claim because his complaint asked solely for money damages and the administrative remedy provided did not provide such damages as a remedy. The respondent claimed that exhaustion would therefore be futile and should be excused. There is, presently a split in the circuits on whether exhaustion is required when the inmate's complaint requests money damages that the administrative remedy cannot afford. *Compare Nyhuis v. Reno, 204 F.3d 65 (3d Cir. 2000) (exhaustion required); Massey v. Helman, 196 F.3d 727 (7th Cir. 1999) (same), petition for cert. filed, No. 99-1918 (May 30, 2000); Wyatt v. Leonard, 193 F.3d 876 (6th Cir. 1999) (same); and Alexander v. Hawk, 159 F.3d 1321 (11th Cir. 1998) (same), with Rumbles v. Hill, 182 F.3d 1064 (9th Cir. 1999) (exhaustion not required), cert. denied, 120 S. Ct. 787 (2000); Whitley v. Hunt, 158 F.3d 882 (5th Cir. 1998) (same); and Garrett v. Hawk, 127 F.3d 1263 (10th Cir. 1997) (same).* In fact, this Court has recently granted certiorari (*No. 99-1964*) on this issue in *Booth v. Churner, 206 F.3d 289, 293-98 (3d Cir. 2000)*. However,

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REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision in this case creates a split in the circuit courts on an issue of great significance nationally and is plainly contrary to this Court's caselaw construing similar statutory language. A ruling from this Court will have an impact upon hundreds, perhaps thousands, of cases either presently pending or to be filed in the future in the federal courts.

I. THE COURT OF APPEALS CREATED A SPLIT AMONG THE CIRCUITS ON AN ISSUE OF GREAT IMPORT TO THE FEDERAL SYSTEM.

As the Court of Appeals' opinion accurately states, the issue in this case presented "an issue of first impression in [the Second] Circuit: whether the exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), encompasses claims for excessive use of physical force under the Eighth Amendment." *Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000). The Court of Appeals decision settled a split of authority among the district courts in the Second Circuit,[4/] but in doing so, the Court of Appeals

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although the respondent renewed his claim on this issue in his appeal to the Court of Appeals, that court did not reach the issue, holding instead that excessive force claims like the respondent's need not be exhausted.

4/ *Compare Cuoco v. United States Bureau of Prisons, No. 98*

Continued on next page...

created a split of authority with the other circuit courts of appeals that had addressed the issue. *See Booth v. Churner, 206 F.3d 289, 293-98 (3d Cir. 2000)* (excessive force claims are actions "brought with respect to prison conditions" under § 1997e(a)), *cert. granted on other grounds, No. 99-1964 (October 30, 2000); Freeman v. Francis, 196 F.3d 641, 643-44 (6th Cir. 1999). See also Wendell v. Asher, 162 F.3d 887, 890-91 (5th Cir. 1998) (implicit); Garrett v. Hawk, 127 F.3d 1263, 1264-66 (10th Cir. 1997) (same).*

Further, it is no exaggeration to state that this Court's ruling on this issue will impact upon hundreds, perhaps thousands, of cases in the federal courts. In fact, Congress passed the PLRA in recognition of the fact that nearly one-quarter of all civil cases commenced in the District Courts are commenced by inmates. *See* 141 Cong. Rec. S7498-01 (May 25, 1995) (statement of Sen. Kyl) (reporting that in 1994, prisoners brought more than

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*Civ. 9009, 2000 WL 347155, at *3-*6 (S.D.N.Y. Mar. 31, 2000) (requiring exhaustion); Castillo v. Buday, 85 F. Supp. 2d 309, 312 (S.D.N.Y. 2000) (same); Beeson v. Fishkill Correctional Facility, 28 F. Supp. 2d 884, 888-92 (S.D.N.Y. 1998) (same); and Tolliver v. Wilson, No. 99 Civ. 9555, 2000 WL 1154311, at *4 (S.D.N.Y. Aug. 14, 2000) ("prison conditions" does not encompass particular incidents of assault or use of excessive force); Giannattasio v. Artuz, No. 97 Civ. 7606, 2000 WL 335242, at *11-*12 (S.D.N.Y. Mar. 30, 2000) (same); Wright v. Dee, 54 F. Supp. 2d 199, 205-06 (S.D.N.Y. 1999) (excusing exhaustion); Carter v. Kiernan, No. 98 Civ. 2664, 1999 WL 14014, at *2-*5 (S.D.N.Y. Jan. 14, 1999) (same); Baskerville v. Goord, No. 97 Civ. 6413, 1998 WL 778396, at *2-*5 (S.D.N.Y. Nov. 5, 1998) (same); Royster v. United States, No. 98 Civ. 4109, 1999 WL 1567734, *3 (S.D.N.Y. Nov. 23, 1999) (same).*

one-fourth of all civil suits filed in the United States District Courts: 60,086 of the 238,590 total suits filed). Suits making claims of excessive force against prison officials are a substantial subset of this enormous number. It is fair to say that resolving the existing circuit split will have a dramatic impact on the federal courts and their efforts to manage these cases. Thus, this case plainly involves an important question of federal law not yet decided by this Court. This, in and of itself, warrants this Court's grant of the writ. Supreme Court Rule 10(a) & (c).

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISION IN *McCARTHY v. BRONSON.*

Moreover, the Court of Appeals' resolution of the statutory construction question "conflicts with relevant decisions of this Court." Supreme Court Rule 10(a). *McCarthy v. Bronson*, 500 U.S. 136, 111 S.Ct. 1737 (1991), an excessive force case in which this Court construed very similar language in a statute that addressed the preservation of federal judicial resources, clearly compels a conclusion that inmates must exhaust administrative remedies before bringing an excessive force claim pursuant to 42 U.S.C. § 1983 and the Eighth Amendment. The Court of Appeals made no effort to deal with this precedent.

A brief overview of the exhaustion of remedies doctrine in the context of actions brought under 42 U.S.C. § 1983 is helpful.

A. Before 1996, Exhaustion Was Not Mandatory For Inmates Bringing § 1983 Actions.

In *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557 (1982), this Court held that 42 U.S.C. § 1983[5/] does not have a general exhaustion requirement. The Court noted, however, that in 42 U.S.C. § 1997e, as it provided then,[6/] Congress had "created a specific, limited exhaustion

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5/ 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

6/ Before 1996, 42 U.S.C. § 1997e(a) provided:

> (1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983)

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requirement for adult prisoners bringing actions pursuant to § 1983." *Id.* at 508. "With the understanding that exhaustion generally is not required [for § 1983 actions], Congress decided to adopt the limited exhaustion requirement of § 1997e in order to relieve the burden on the federal courts by diverting certain prisoner petitions back through state and local institutions, and also to encourage the States to develop appropriate grievance procedures." *Id.* at 509.

As this Court noted in *McCarthy v. Madigan*, 503 U.S. 140, 150, 112 S.Ct. 1081 (1992), § 1997e(a) was not mandatory. Rather, a court's discretionary determination to direct an inmate to exhaust his administrative remedies hinged on its finding that the remedy was "plain, speedy, and effective," and that requiring its exhaustion would be "appropriate and in the interests of justice."

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> by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.
>
> (2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) or are otherwise fair and effective.

B. Congress' Adoption Of The PLRA Broadened And Made Mandatory The Application Of The Inmate Exhaustion Requirement.

In 1996, Congress acted on its concern about the rising number of federal civil rights actions brought by inmates. 141 Cong. Rec. S14408-01 *S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (noting that prisoner suits had increased from 6600 in 1975 to more than 39,000 in 1994); 141 Cong. Rec. S7498-01 (May 25, 1995) (statement of Sen. Kyl) (reporting that in 1994, prisoners brought more than one-fourth of all civil suits filed in the United States District Courts: 60,086 of the 238,590 total suits filed); 141 Cong. Rec. S14, 626-27 (1995) (statement of Sen. Hatch)(reporting that 39,000 lawsuits were filed by inmates in federal courts in 1994, a number that excludes "habeas corpus petitions or other cases challenging the inmate's conviction or sentence"). Increasingly large amounts of federal judicial time and resources were being devoted to inmate actions, crowding federal dockets at every level. Many of these actions, Congress believed, were either frivolous, unmeritorious or could have been addressed and rectified at the agency level.

Against this landscape, Congress passed the Prison Legal Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-73 (1996) ("PLRA"), § 803 of which replaced the previous version of § 1997e. Section 803 of the PLRA provides:

> No action shall be brought *with respect to prison conditions* under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted. (emphasis supplied)

This provision resulted in three significant changes to the language of § 1997e. First, the exhaustion requirement is no longer restricted just to § 1983 actions, but now also applies to all cases "brought . . . under any other Federal law." Second, exhaustion is now mandatory, and not merely discretionary. See Historical and Statutory Notes, 42 U.S.C.A. § 1997e (West Supp. 1997). That is, Congress has removed from federal courts the discretion to decide whether exhaustion would be appropriate and in the interests of justice, and has relieved courts, and the Attorney General, of the burden of evaluating whether the "available" administrative remedy substantially complies with minimum acceptable standards.[7/] Third, the

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7/ The PLRA "amends the CRIPA [Civil Rights of Institutionalized Persons Act] by requiring that all available administrative remedies be exhausted prior to a civil action being initiated on behalf of an inmate. Under CRIPA, courts were given the discretion of allowing for the exhaustion of administrative remedies, but were not required to do so. Under [the PLRA], that discretion is eliminated." Bernard D. Reams, Jr. & William H. Manz, A Legislative History of

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administrative remedy required to be exhausted need no longer be "plain, speedy, and effective," but rather the inmate must exhaust "such administrative remedies as are available."

"Congress did not enact the PLRA in a vacuum. It held hearings and rendered findings, concluding that prisoners file more frivolous lawsuits than any other class of persons." *Alexander v. Hawk*, 159 F.3d 1321, 1324 (11th Cir. 1998); *Rivera v. Allin*, 144 F.3d 719, 727-28 (11th Cir. 1998). Thus, Congress intended § 1997e(a) to "curtail the ability of prisoners to bring frivolous and malicious lawsuits by forcing prisoners to exhaust *all* administrative remedies before bringing suit in Federal court." 141 Cong. Rec. H1472-06, *H1480 (daily ed. Feb 9, 1995) (emphasis supplied). The legislation leaves no room for a court to assess the severity of the allegations, to determine whether facially they state a claim or otherwise appear to have merit or to parse the forms of relief demanded. Instead a court must look first at whether the prisoner plaintiff has exhausted available administrative remedies; if not, the court must dismiss the action.

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the Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, Docs. No. 32 & 33 (1997), hearings Before the Subcommittee on the Judiciary, house of Representatives, January 19 & 19, 1995, Doc. 53, at 82.

C. Consistent With This Court's *McCarthy v. Bronson* Decision, Actions "With Respect To Prison Conditions" Include Excessive Force Claims.

The plaintiff argued and the Court of Appeals agreed that his excessive force claim, brought under the Eighth and Fourteenth Amendments, is not an action "with respect to prison conditions," and therefore the PLRA's exhaustion requirement does not apply to him. This ruling, however, conflicts directly with this Court's construction of very similar language in a very similar context to *include* excessive force claims, contrary to the Court of Appeals' conclusion in this case.

In *McCarthy v. Bronson*, 500 U.S. 136, 139-43, 111 S.Ct. 1737 (1991), the Court addressed the Magistrate's Act, which permits District Courts to refer certain types of cases, including inmate cases, to magistrate judges for trial, proposed findings of fact and recommendations for disposition in order to lessen the burden of inmate cases on District Courts. Specifically at issue was the phrase "prisoner petitions challenging conditions of confinement," a phrase very similar to "actions . . . with respect to prison conditions," found in 42 U.S.C. § 1997e. The Court in *McCarthy* construed the phrase to include both allegations regarding ongoing prison conditions and allegations regarding specific episodes of unconstitutional conduct by prison officials, including claims of excessive force. This Court concluded that the plaintiff inmate's excessive force claim fell within the meaning of "petitions challenging conditions of confinement," and that the petition in that case was therefore properly referred to a magistrate judge non-consensually.

In reaching this conclusion, this Court determined that the "text of the statute does not define the term 'conditions of confinement' or contain any language suggesting that prisoner petitions should be divided into subcategories." On the contrary, when the relevant section is read in its entirety, "it suggests that Congress intended to authorize the nonconsensual reference of *all* prison petitions to a magistrate." *Id.* (emphasis supplied). Specifically, the Court rejected a claim that the words "conditions of confinement" limited the statute's application so as to take excessive force claims out of its reach. "The broader reading we adopt [ ] comports with the policy behind the Act . . . . to assist federal judges in handling an ever-increasing caseload'". . . by allowing "referral of broader category of cases." *Id.* at 142-43, quoting S. Rep. No. 94-625, p. 2 (1976).

The Court in *McCarthy* also reasoned that its reading "furthers the policy of the Act because its simplicity avoids the litigation that otherwise would inevitably arise in trying to identify the precise contours of [the] suggested exception for single episode cases. Petitioner's definition would generate additional work for the district courts because the distinction between cases challenging ongoing conditions and those challenging specific acts of alleged misconduct will often be difficult to identify." *Id.* at 143.

This Court has often held that "Congress will be presumed to have legislated against the background of our traditional legal concepts"; *United States v. United States Gypsum Co.*, 438 U.S. 422, 437, 98 S.Ct. 2864 (1978); and specifically Congress is presumed to be aware of the Supreme Court's interpretations of its statutes. *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866 (1978). Thus, by passing a judicial resources preservation statute in 1996

against a legal landscape in which the Supreme Court in *McCarthy v. Bronson* had construed a similar phrase to include excessive force claims, the only reasonable construction of the phrase "prison conditions" includes allegations of excessive force. *See Diezcabeza v. Lynch*, 75 F.Supp.2d 250, 253 (S.D.N.Y. 1999) (claims of excessive force by correction officers "most assuredly" constitute the "effects of actions by government officials on the lives of persons confined in prison").

This conclusion is buttressed by the fact that the section of the PLRA immediately preceding the section that amended 42 U.S.C. § 1997e defines "prison conditions" in a way that would include excessive force. Specifically, 18 U.S.C. § 3636(g)(2), which addresses appropriate remedies regarding prison conditions and which was enacted at the same time and as part of the same legislation (the PLRA) that amended § 1997e, provides: "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or *the effects of actions by government officials on the lives of persons confined in prison* . . . ." (emphasis supplied).

"[L]anguage used in one portion of a statute . . . should be deemed to have the same meaning as the same language used elsewhere in the statute." *Mertens v. Hewitt Associates*, 508 U.S. 248, 260, 113 S.Ct. 2063 (1993). *See also Commissioner v. Lundy*, 516 U.S. 235, 250, 116 S.Ct. 647 (1996). There could hardly be a clearer case in which Congress should be presumed to have intended one term to have the same meaning in different parts of the same Act, particularly because the amendment that became 18 U.S.C. § 3626g(2) was § 802 of the PLRA, while the amendment to § 1997e was § 803 of the PLRA. Employing the definition from 18 U.S.C. § 3626g(2), as the District Court

properly did, the plaintiff's claims about the defendants' alleged use of force upon him concern "the effects of actions by government officers" upon his life, and thus fall squarely within the statute. *See Freeman v. Francis*, 196 F.3d 641, 643-45 (6th Cir. 1999).

The Court of Appeals, in looking at the definition from § 3626g(2), thought the language too "awkward" to "ordinarily" describe instances of excessive force. Specifically, it quoted the dissent from the Third Circuit case, which argued:

A guard hits you on the mouth. Would you report the blow by saying, 'A government official has taken an action having an effect on my life?' No speaker of English would use such a circumlocution. Why should we attribute such circuitousness to Congress? When bones are broken or mouths are mauled, no one on earth, educated or uneducated, would use such roundabout phraseology to express the blow.

Nussle v. Willette, 224 F.3d 95, 103 (2d Cir. 2000), quoting *Booth v. Churner*, 206 F.3d 289, 302 (*Noonan, J., concurring and dissenting*). Of course, this observation could be made just as persuasively about a lawsuit against the prison barber for a bad haircut, which the legislative history describes as one of the paradigmatic claims that the PLRA sought to prevent. See 141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham). "Would you report the [bad haircut] by saying, 'A government official has taken an action having an effect on my life?' No speaker of English would use such a circumlocution." *Nussle v. Willette*, 224 F.3d 95, 103 (2d Cir. 2000), quoting *Booth v. Churner*, 206 F.3d 289, 302 (*Noonan, J., concurring and dissenting*).

What the Court of Appeals in this case and the dissenting judge in *Booth* describe is simply a reflection of

the imprecision in language that often accompanies a legislature's attempt to sweep broadly. In *McCarthy*, this Court faced the very same problem with very similar language, and even went so far as to state: "We do not quarrel with petitioner's claim that the most natural reading of the phrase 'challenging conditions of confinement,' when viewed in isolation, would not include suits seeking relief from isolated episodes of unconstitutional conduct. However, statutory language must always be read in its proper context." *McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S.Ct. 1737 (1991).[8/]

Moreover, reading the term "prison conditions" to include claims like the plaintiff's is consistent with the purpose and legislative history of the PLRA: to reduce both frivolous prisoner lawsuits and federal court intervention into the management of prison systems. As the Sixth Circuit has stated:

A broad exhaustion requirement that includes excessive force claims effectuates this purpose and maximizes the benefits of requiring prisoners to use prison grievance procedures before coming to federal court.

8/ Similarly, this Court in *McCarthy* rejected the argument, also advanced here by the respondent, that there is a distinction in Eighth Amendment jurisprudence between claims based on excessive force and those based on prison conditions. While this distinction might hold true in some contexts, Congress did not manifest in the PLRA an intent to draw this distinction between § 1983 actions. As the District Court below stated, "there is no reason to believe, nor is there any evidence that Congress actually believed, that excessive force claims are more meritorious than any other category of prisoner litigation." (A-29)

Prisons need to know about and address claims of excessive force as they would any other claim concerning prison life so that steps may be taken to stop problems immediately if they exist.

Freeman v. Francis, 196 F.3d 641, 643-45 (6th Cir. 1999). Requiring exhaustion in excessive force cases, as much as in other cases (if not more), also advances the policy of permitting the prison administration, and ultimately the federal court, to create a timely and accurate "record of the conduct and actions complained of by those close to the scene with intimate knowledge of the facts, people and circumstances [, which] can be of invaluable assistance in arriving at just and expeditious results, limiting the need for prolonged, imperfect and often difficult discovery in federal court." *Cruz v. Jordan*, 1999 U.S.Dist. LEXIS 11487 *28-29 (S.D.N.Y. 1999). *See also McCarthy v. Madigan*, 503 U.S. 140, 145, 112 S.Ct. 1081 (1992) (noting exhaustion "may produce a useful record for subsequent judicial consideration").

In fact, to accept the view of the respondent, and the Court of Appeals below, would require this Court to conclude that in passing the PLRA, Congress intended to exclude from its reach one out of the myriad types of § 1983 claims that prisoners might file. Not only is there nothing in the statute's plain language to support this argument, there is nothing in the legislative history of the Act that could in any way lead the Court to this conclusion. To the contrary, the legislative record indicates that Congress expected the PLRA exhaustion requirement to apply to prison assault cases. *See* 141 Cong. Rec. S14,628 (1995) (statement of Sen. Biden) (opposing the PLRA and discussing two prison assault cases as examples of suits that would be hindered by the passage of the PLRA); 141 Cong. Rec. S7498-01, *S7524 (Statement of Sen. Dole) (referring to "cruel and unusual punishment" complaints).

The Court of Appeals below ignored these legislative statements completely, choosing to rely instead upon the statements about lawsuits over the types of peanut butter provided in prison and the failure to be invited to a pizza party. These statements are admittedly more prevalent in the legislative history, but only because they so vividly illustrate the types of lawsuits prison officials confront. The statements by no means provide the basis for concluding, as the Court of Appeals did here, that Congress intended to distinguish between "claims that may be frivolous as to subject matter" versus claims that if proven factually would not be frivolous. For example, no one can credibly contest that an inmate complaining of restrictions on religious freedom that would constitute a grave First Amendment violation would nonetheless be subject to the exhaustion requirement.[9/] There simply is no principled way based on the statutory language and legislative history to carve out excessive force claims from the universal claims that prisoners might bring, some of which may raise previous constitutional issues.

9/ It is important to note that the District Court's and the defendants' position would not prevent the plaintiff and others with such constitutional grievances from ultimately filing federal actions to obtain damages for them. Rather, Congress has simply added a preliminary exhaustion requirement prior to the commencement of such a suit, and done so because it has determined, after holding hearings and gathering information, that inmate cases generally have less merit and clog the federal courts more than other classes of cases. Said another way, no one is denying, as the Court of Appeals seems to believe, that there is a "difference between punching a prisoner in the face and serving him unappetizing food." *Hudson v. McMillan*, 503 U.S. 1, 11, 112 S.Ct. 995 (1991) . The point simply is that Congress intended an exhaustion requirement for both types of claims.

CONCLUSION

Given this Court's construction of similar language in *McCarthy*, the context of the legislation, the breadth of its intended application and the legislative history surrounding its enactment, the most reasonable and accurate construction of the language of § 1997e(a) is that Congress intended the exhaustion requirement to apply to all types of prisoner claims. There is no reason to believe that Congress intended to exempt the plaintiff's particular type of case from the general exhaustion requirement.

For all of the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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In The
Supreme Court Of The United States
October Term, 2000

CORRECTION OFFICER PORTER AND
CORRECTION OFFICER WILLETTE
Petitioners,

v.

RONALD NUSSLE
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: May 3, 2000 Decided: August 24, 2000)

Docket No. 99-0387

RONALD NUSSLE,

Plaintiff-Appellant,

-v.-

WILLETTE, CORRECTION OFFICER, and PORTER, CORRECTION OFFICER,

Defendants-Appellees.

Before: CALABRESI, PARKER, and STRAUB, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the District of Connecticut (Alan H. Nevas, *Judge*) granting the defendant's motion to dismiss the plaintiff's § 1983 complaint for failure to exhaust administrative remedies. The District Court held that the Prison Litigation Reform Act of 1995 ("PLRA") required the plaintiff to exhaust administrative remedies before bringing his § 1983 claim to court. We reverse the District Court's judgment, holding that the PLRA exhaustion requirement does not encompass claims for assault or excessive use of physical force under the Eighth Amendment.

Vacated and remanded.

NORMAN A. PATTIS, Williams and Pattis, LLC, New Haven, CT, *for Plaintiff-Appellant.*

GREGORY T. D'AURIA, Assistant Attorney General, State of Connecticut (Richard Blumenthal, Attorney General, and Robert B. Fiske, III, Assistant Attorney General, on the brief), for Defendants-Appellees.

STRAUB, *Circuit Judge*:

Appellant Ronald Nussle appeals from a judgment of the United States District Court for the District of Connecticut (Alan H. Nevas, *Judge*), dismissing his complaint for failure to exhaust administrative remedies. Nussle's appeal presents an issue of first impression in this Circuit: whether the exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), encompasses claims for excessive use of physical force under the Eighth Amendment. Because we conclude that § 1997e(a) does not apply to allegations of particular instances of excessive force or assault by prison employees, we vacate the District

Court's judgment and remand for reinstatement of Nussle's complaint.

BACKGROUND

This action arises from Nussle's claim that he was wrongfully assaulted by corrections officers acting under color of law at the Cheshire Correctional Institute ("CCI") in Cheshire, Connecticut. Nussle has been an inmate at CCI, under custody of the Connecticut Department of Corrections ("DOC"), since May 1996. He alleges that from the time of his arrival at CCI, he was the target of a prolonged and sustained pattern of harassment and intimidation by corrections officers on account of his perceived friendship with the Governor of the State of Connecticut. Nussle complains of injuries arising from one particular violent incident during that period. According to Nussle, on or about June 15, 1996, defendants Willette [1] and Porter entered his cell, instructed him to leave the cell, and proceeded to beat him without apparent provocation or justification of any sort. The officers allegedly "placed [Nussle] against a wall and struck him with their hands, kneed him in the back, [and] pulled his hair. The plaintiff was beaten so badly he lost control of his bowels." Nussle claims that these actions were motivated by a sadistic intent to cause physical pain, and that the officers threatened to kill him if he reported the beating. As a result of the incident, Nussle asserts that he suffered bruises, lacerations, physical pain (including ongoing numbness in his right leg), and emotional distress.

On June 10, 1999, Nussle commenced this action against corrections officers Willette and Porter in their individual capacities. His claim under 42 U.S.C. § 1983 alleges that the officers violated his Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment and his Fourteenth Amendment right to substantive due process. [2] Nussle also asserted pendent state law claims for assault and battery. In order to remedy his injuries, Nussle's complaint sought compensatory and punitive damages as well as attorney's fees and the costs of bringing this action.

The defendants moved to dismiss Nussle's complaint on the ground that he had failed to exhaust administrative remedies. The District Court agreed and granted the defendants' motion, holding that the exhaustion requirement of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) ("PLRA") (codified at 42 U.S.C. § 1997e(a) (Supp. 2000)), required Nussle first to exhaust DOC's administrative remedies before taking his § 1983 claim to court. This timely appeal followed.

DISCUSSION

We review a grant of a motion to dismiss for lack of exhaustion *de novo*, taking as true all allegations in the complaint, and drawing all reasonable inferences therefrom in favor of the nonmoving party. *See In re Merrill Lynch Ltd. Partnerships Litig.*, 154 F.3d 56, 58 (2d Cir. 1998). We must "vacate the dismissal unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief." *SEC v. U.S. Envtl., Inc.*, 155 F.3d 107, 110 (2d Cir. 1998) (internal quotation marks omitted).

I. Enactment of the PLRA Exhaustion Requirement

As a general matter, exhaustion of state remedies, whether administrative or judicial, is not a prerequisite to maintaining an action under § 1983. *See Patsy v. Board of Regents*, 457 U.S. 496, 508 (1982); *see also Heck v. Humphrey*, 512 U.S. 477, 480 (1994); *Doe v. Pfrommer*, 148 F.3d 73, 78 (2d Cir. 1998). Statutory purpose and legislative intent support this presumptive rule of non-exhaustion. The "very purpose" of § 1983, the precursor of which first was enacted during Reconstruction as part of the Ku Klux Act of April 20, 1871, ch. 22, 17 Stat. 13, was "to interpose the federal courts between the States and the people, as guardians of the people's federal rights-to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225,

242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)); *see Patsy*, 457 U.S. at 503.

Nevertheless, exhaustion of state remedies may be required in those limited circumstances in which "Congress has carved out a specific exception to the general rule that exhaustion is not required." *Doe*, 148 F.3d at 78. The inmate exhaustion provision at issue in this case, 42 U.S.C. § 1997e(a), is an exception of this sort. This provision first was enacted in 1980 as part of the Civil Rights of Institutionalized Persons Act ("CRIPA"), Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended at 42 U.S.C. §§ 1997, 1997a-1997j (1994 & Supp. 2000)), and was intended to be "only a narrow exception" to the general rule of non-exhaustion in § 1983 actions. *Patsy*, 457 U.S. at 508 (1982) (refusing to require exhaustion for § 1983 claims not covered by the CRIPA exhaustion provision); *see also McCarthy v. Madigan*, 503 U.S. 140, 149 (1992) (declining to extend § 1997e(a)'s exhaustion provision to *Bivens* actions). The pre-PLRA version of § 1997e(a) provided a discretionary mechanism by which courts could (but were not obligated to) require prisoners to exhaust state administrative remedies before asserting claims under § 1983. 3

Section 803(d) of the PLRA added teeth to the § 1997e(a) exhaustion provision, affirmatively *requiring* prisoners to exhaust administrative remedies, whether federal or state, before bringing any federal claims "with respect to prison conditions." 4 The PLRA strengthened the § 1997e(a) exhaustion provision in three relevant respects. First, by its own terms the pre-PLRA exhaustion provision applied only to § 1983 claims, not to actions brought under other federal laws. *See, e.g.*, *McCarthy*, 503 U.S. at 150. The amended provision, by contrast, applies to any federal claim brought "with respect to prison conditions." 42 U.S.C. § 1997e(a). Second, the pre-PLRA provision was not mandatory upon courts. Rather, it simply *authorized* courts to invoke exhaustion, at their discretion, if requiring exhaustion "would be appropriate and in the interests of justice." 42 U.S.C. § 1997e(a)(1) (1994) (amended 1996). In so doing, a court was permitted only to "continue" the action for up to 180 days, not to dismiss the action outright. *See*

McCarthy, 503 U.S. at 150; *Patsy*, 457 U.S. at 510-11. The PLRA, however, requires exhaustion of available administrative remedies before inmate-plaintiffs may bring their federal claims to court at all. Third, exhaustion under the pre-PLRA version of § 1997e only could be required if two conditions were met: (1) if the available administrative procedures were "plain, speedy, and effective"; and (2) if the Attorney General certified, or the court itself determined, that the prison's grievance provisions substantially complied with minimum acceptable standards set forth by the Attorney General or were "otherwise fair and effective." *See Patsy*, 457 U.S. at 510-11. The PLRA, on the other hand, does not make "effectiveness" of administrative remedies a precondition to the exhaustion requirement.

At the same time that it expanded the scope of CRIPA's exhaustion provision, the PLRA also explicitly limited its applicability only to federal actions that are brought "with respect to prison conditions"-a qualification on the scope of the exhaustion provision not found in the pre-PLRA version of § 1997e(a). Therefore, analysis of whether the amended version of § 1997e(a) applies to excessive force or assault claims must account for the manner in which the PLRA broadened the scope of this provision as well as the manner in which it simultaneously limited that scope. Both aspects of this amendment, in other words, must be presumed to have "real and substantial effect," *Stone v. INS*, 514 U.S. 386, 397 (1995), so as not to render statutory language superfluous. *See Baskerville v. Goord*, No. 97 Civ. 6413, 1998 WL 778396, at *3 (S.D.N.Y. Nov. 5, 1998); *see also Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (courts should avoid interpreting statutory language in a manner that renders other textual provisions superfluous or unnecessary).

We interpret the amended version of § 1997e(a) against the background principles that govern exhaustion of administrative remedies generally, *see United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) ("Congress will be presumed to have legislated against the background of our traditional legal concepts"); *United States v. Figueroa*, 165 F.3d 111, 115 (2d Cir. 1998), and

in light of the interpretive principle that statutory exceptions are to be construed "narrowly in order to preserve the primary operation of the [general rule]." *Commissioner v. Clark*, 489 U.S. 726, 739 (1989); *see also Patsy*, 457 U.S. at 508 (exhaustion provision in § 1997e(a) is intended to be "only a narrow exception" to the general rule of non-exhaustion in § 1983 cases); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995) (narrowly interpreting statutory exception in Fair Housing Act); *Tasini v. New York Times Co.*, 206 F.3d 161, 168 (2d Cir. 2000) (narrowly interpreting statutory exception in Copyright Act).

I. Applicability of § 1997e to Excessive Force or Assault Claims

Whether or not assault or excessive force claims are subject to the amended version of the § 1997e(a) exhaustion requirement turns entirely on whether such claims fall within the category of actions "brought with respect to prison conditions" covered by that provision. If particular incidents of assault or the use of excessive force do not constitute "prison conditions" within the meaning of the statutory text, then Nussle's § 1983 claim should not be subject to the exhaustion requirement. Conversely, if claims for particular instances of assault or excessive force *are* properly considered claims "brought with respect to prison conditions," then Nussle must fulfill § 1997e(a)'s requirement that he exhaust "such administrative remedies as are available" [5] before taking his federal claims to court. 42 U.S.C. § 1997e(a). The issue is one of first impression in this Circuit. *See Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (declining to resolve the "complex legal issue[]" of whether § 1997e(a)'s exhaustion requirement encompasses particular claims for excessive force).

Courts have divided over whether excessive force and assault claims are encompassed within this provision. *See id.* (noting split in authority). A number of courts that have analyzed the issue, including the Third and Sixth Circuits, have concluded that § 1997e(a) does encompass such claims. [6] *See Booth v. Churner*, 206 F.3d 289, 293-98 (3d Cir. 2000) (excessive force claims are actions "brought with

respect to prison conditions" under § 1997e(a)), *petition for cert. filed*, No. 99-1964 (June 5, 2000); *Freeman v. Francis*, 196 F.3d 641, 643-44 (6th Cir. 1999); *Cuoco v. United States Bureau of Prisons*, No. 98 Civ. 9009, 2000 WL 347155, at *3-*6 (S.D.N.Y. Mar. 31, 2000); *Castillo v. Buday*, 85 F. Supp. 2d 309, 312 (S.D.N.Y. 2000); *Beeson v. Fishkill Correctional Facility*, 28 F. Supp. 2d 884, 888-92 (S.D.N.Y. 1998). However, a number of courts have held to the contrary. *See Tolliver v. Wilson*, No. 99 Civ. 9555, 2000 WL 1154311, at *4 (S.D.N.Y. Aug. 14, 2000) ("prison conditions" does not encompass particular incidents of assault or use of excessive force); *Giannattasio v. Artuz*, No. 97 Civ. 7606, 2000 WL 335242, at *11-*12 (S.D.N.Y. Mar. 30, 2000); *Wright v. Dee*, 54 F. Supp. 2d 199, 205-06 (S.D.N.Y. 1999); *Carter v. Kiernan*, No. 98 Civ. 2664, 1999 WL 14014, at *2-*5 (S.D.N.Y. Jan. 14, 1999); *Baskerville v. Goord*, No. 97 Civ. 6413, 1998 WL 778396, at *2-*5 (S.D.N.Y. Nov. 5, 1998); *Royster v. United States*, No. 98 Civ. 4109, 1999 WL 1567734, *3 (S.D.N.Y. Nov. 23, 1999); *see also Peddle v. Sawyer*, 64 F. Supp. 2d 12, 15-16 (D. Conn. 1999) ("prison conditions" does not encompass sexual assault). In light of the text, structure, and legislative history of the PLRA, we agree with those courts that have held that § 1997e(a) does not encompass particular instances of excessive force or assault.

A. *Statutory Text of § 1997e(a)*

In considering the proper scope of §1997e(a), we begin by examining the text of the statute itself, since the language of a statutory provision, if clear and unambiguous on its face, is presumed to bear its plain meaning unless the text suggests an absurd result. *See Devine v. United States*, 202 F.3d 547, 551 (2d Cir. 2000) ("In the usual case, if the words of a statute are unambiguous, judicial inquiry should end, and the law is interpreted according to the plain meaning of its words."). When considering plain meaning, we nevertheless must also keep in mind context and the structure of the statute as a whole. *See, e.g., Miller v. French*, 120 S. Ct. 2246, 2248-49 (2000); *see also Bailey v. United States*, 516 U.S. 137, 145 (1995) ("The meaning of statutory language, plain or not, depends on context." (internal quotation marks and citation omitted)); *K Mart*

Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (assessment of plain meaning must also look to "language and design of the statute as a whole").

The use in § 1997e(a) of the term "prison conditions," however, is scarcely free of ambiguity. Section 1997e(a) itself provides no definition of what constitutes a claim "brought with respect to prison conditions"-and neither does § 1997e(h), the definitional provision of § 1997e, or § 1997, which also defines terms used in § 1997e. The plain meaning of "prison conditions" in § 1997e(a) does not obviously encompass particular instances of excessive force or assault, as the defendants argue here-indeed, it actually suggests the opposite. In the context of this statute, the term "conditions," used in its plural form, denotes "attendant circumstances" or an "existing state of affairs"-as exemplified by such ordinary phrases as "living conditions," "playing conditions," and "adverse weather conditions." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 473 (1961); *see also Booth*, 206 F.3d at 300-01 (Noonan, J., concurring and dissenting). In light of this definition of "conditions," the use of the term "prison conditions" in § 1997e(a) would appear to refer to "circumstances affecting everyone in the area affected by them," rather than "single or momentary matter[s]," such as beatings or assaults, that are directed at particular individuals. 7 *Booth*, 206 F.3d at 300-01 (Noonan, J., concurring and dissenting); *see also Carter*, 1999 WL 14014, at *3 ("The ordinary, contemporary, common meaning of the phrase 'prison conditions' refers to such things as medical treatment, food, clothing, and the nature and circumstances of the housing available in prison.").

B. *Relationship between 42 U.S.C. § 1997e(a) and 18 U.S.C. § 3626(g)(2)*

While § 1997e(a) does not expressly define the term "prison conditions," similar language is used and explicitly defined in a different section of the PLRA, 18 U.S.C. § 3626(g)(2). 8 This definition, by its own terms, only applies to "this section"-*i.e.*, 18 U.S.C. § 3626. Nevertheless, the defendants urge that § 1997e(a) should be read *in pari*

materia with 18 U.S.C. § 3626, based on the interpretive canon that language "used in one portion of a statute . . . should be deemed to have the same meaning as the same language used elsewhere in the statute." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260 (1993); *see also Russo v. Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40, 45 (2d Cir. 1988) ("Construing identical language in a single statute *in pari materia* is both traditional and logical."). Other courts have read the "prison conditions" language of § 1997e(a) *in pari materia* with the definition provided in 18 U.S.C. § 3626(g)(2). *See, e.g. Booth*, 206 F.3d at 294; *Freeman*, 196 F.3d at 643-44; *Beeson*, 28 F. Supp. 2d at 888; *Giannattasio*, 2000 WL 335242, at *11-*12. *But see Carter*, 1999 WL 14014, at *3-*4 (declining to rely upon the § 3626(g)(2) definition to interpret meaning of "prison conditions" under § 1997e(a)). The text of § 3626(g)(2), however, is no less ambiguous than the text of § 1997e(a) itself-indeed, judges have reached opposite conclusions on whether § 1997e(a) encompasses excessive force and assault claims notwithstanding their common reliance on 18 U.S.C. § 3626(g)(2) for guidance. *Compare, e.g., Booth v. Churner*, 206 F.3d at 294-95 (opinion of the court) (excessive force claims are encompassed within the § 3626(g)(2) definition); *and Beeson*, 28 F. Supp. 2d at 888-89 (same), *with Booth*, 206 F.3d at 301-02 (Noonan, J., concurring and dissenting) (excessive force claims do not fall within the definition in 18 U.S.C. § 3626(g)(2) and are therefore outside the scope of § 1997e(a)); *Baskerville*, 1998 WL 778396, at *4-*5 (same).

Section 3626(g)(2) encompasses two categories of civil actions: (1) those brought with respect to "conditions of confinement," and (2) those brought with respect to "the effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2) (Supp. 2000). Section 3626(g)(2)'s reference to "conditions of confinement" is "no more apt" to include particular instances of assault or excessive force than the reference to "prison conditions" in § 1997e(a) itself. *Booth*, 206 F.3d at 301 (Noonan, J., concurring and dissenting). To characterize particular instances of assault or the use of excessive force as "conditions of confinement" clearly

departs from normal, everyday use of the phrase, as the Third Circuit concedes and other courts apparently do not urge. *See id.* at 294, 296 n.5 (opinion of the court) (excessive force claims "do not naturally fall into" category of actions "with respect to conditions of confinement"); *id.* at 301 (Noonan, J., concurring and dissenting) (statutory phrase "'conditions of confinement' does not encompass specific batteries").

Instead, those courts requiring exhaustion have, without exception, placed excessive force and assault claims within the second category set forth in § 3626(g)(2), "effects of actions by government officials on the lives of persons confined in prison." *See, e.g., id.* at 294-95 (opinion of the court); *Beeson*, 28 F. Supp. 2d at 888-89 (quoting and following *Moore v. Smith*, 18 F. Supp. 2d 1360, 1363 (N.D. Ga. 1998)). In so doing, however, these courts have simply assumed it to be self-evident that such claims fall within the scope of § 3626(g)(2)'s second category-with a typical example being the Third Circuit's broad reading of that phrase to include almost all actions by government officials that "affect the lives of prisoners similarly . . . [by making] their lives worse." *Booth*, 206 F.3d at 295; *see also Beeson*, 28 F. Supp. 2d at 888-89 (concluding, without analysis, that excessive force claims are included within the ambit of § 3626(g)(2)).

We disagree with the notion that particular instances of assault or excessive force self-evidently constitute "effects of actions by government officials on the lives of persons confined in prison" under the second category of § 3626(g)(2), since such awkward language would not, ordinarily, be used to describe such incidents. In his dissent from the Third Circuit's decision in *Booth v. Churner*, Judge Noonan, sitting by designation, vividly argues this point:

> A guard hits you on the mouth. Would you report the blow by saying, 'A government official has taken an action having an effect on my life?' No speaker of English would use such a circumlocution. Why should we attribute such circuitousness to Congress? When bones are broken

> or mouths are mauled, no one on earth, educated or uneducated, would use such roundabout phraseology to express the blow.

Booth, 206 F.3d at 302 (Noonan, J., concurring and dissenting); *see Giannattasio*, 2000 WL 335242, at *12 (holding that the use of excessive force does not constitute a "prison condition" in the ordinary sense of the term). The use of "roundabout phraseology," of course, does not necessarily end the inquiry, for Congress certainly "has a right to define one thing to mean something different from what it normally means." *Benjamin v. Jacobson*, 172 F.3d 144, 173 (2d Cir.) (en banc) (Calabresi, J., concurring), *cert. denied*, 120 S. Ct. 72 (1999). Still, the "elephantine way" in which Congress drafted § 3626(g)(2), *Booth*, 206 F.3d at 302 (Noonan, J., concurring and dissenting), does signal the need for closer inquiry-for it is hardly certain that the text of the statute includes claims of excessive force or assault, at least not without further explanation. 9 *Cf. Benjamin*, 172 F.3d at 192 n.35 (Calabresi, J., concurring) ("[I]f [a legislature] seems to say that a banana *is* an apple, we should not hesitate to try to figure out what it really meant to say.").

C. *Structure, Purpose, and Legislative History of the PLRA*

Since the text of both 42 U.S.C. § 1997e(a) and 18 U.S.C. § 3626(g) are ambiguous, we turn to the structure and purpose of the statute as a whole, the legislative history of the PLRA, and the broader legal context for interpretive guidance concerning the meaning of "prison conditions" and the relationship between § 1997e(a) and § 3626(g)(2). *See McCarthy v. Bronson*, 500 U.S. 136, 139 (1991); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (in addition to statutory language, courts must also look to the "design of the statute as a whole and to its object and policy" to determine the statute's meaning).

Sections 3626(g)(2) and 1997e(a), enacted by §§ 802 and 803 of the PLRA, respectively, advance distinct statutory purposes. While 42 U.S.C. § 1997e(a) is concerned with filtering out frivolous suits administratively, before they get

to court, 18 U.S.C. § 3626-codified in an entirely different title of the U.S. Code-is concerned with the different purpose of preventing "courts from micromanaging prison systems . . . [and] usurping the authority given to prison administrators to decide matters of routine prison administration." *Baskerville*, 1998 WL 778396, at *4 (internal quotation marks, citations, and footnote omitted); *see also Benjamin*, 172 F.3d at 182 (Calabresi, J., concurring) (noting that by enacting § 3626, "Congress meant to get the federal courts out of the business of running jails").

In this light, the term "government officials" in § 3626(g)(2) is most plausibly understood to refer to administrative and policymaking officials, rather than those prison employees, such as the corrections officers alleged to have used excessive physical force against Nussle, who have day-to-day contact with inmates but no administrative or policymaking authority. *See Giannattasio v. Artuz*, No. 97 Civ. 7606, 2000 WL 335242, at *12 (concluding that the second category in § 3626(g)(2) refers to "acts of supervisory officials, such as the imposition of general rules and policies, that influence how a prison is run . . . [and not] day-to-day interactions between prisoners and corrections officers"); *Baskerville*, 1998 WL 778396, at *4 (interpreting § 3626(g)(2) in light of that section's purpose to conclude that the definition "contemplates actions by prison officials that have broad effects on prison administration"). A similar use of the term "official" in a different part of the same section supports this conclusion. Section 3626(a)(3)(F), concerned with the prerequisites for the issuance of prisoner release orders, confers standing to oppose such release orders upon "[a]ny State or local official" whose "jurisdiction or function includes" the appropriation of funds for prison facilities; the construction, operation, or maintenance of those facilities; or the prosecution or custody of prisoners who might be released under such orders. *See, e.g., Ruiz v. Estelle*, 161 F.3d 814, 819-21 (5th Cir. 1998) (discussing and interpreting § 3626(a)(3)(F)), *cert. denied*, 526 U.S. 1158 (1999). As in § 3626(g)(2), this usage of the word "official" quite clearly

refers to those officials with administrative or policymaking responsibility.

An examination of cases in which § 3626 directly has been applied also reinforces this conclusion: the types of "government officials" who were defendants or parties to consent decrees in the institutional reform actions brought prior to the enactment of the PLRA routinely were senior policymaking or administrative officials. *See, e.g.*, *Miller v. French*, 120 S. Ct. 2246, 2250-51 (2000) (inmate class action initially brought against Indiana prison officials, including superintendent of correctional facility); *Ruiz v. Johnson*, 178 F.3d 385, 387 (5th Cir. 1999) (inmate class action initially brought against Texas prison officials, including director of Texas Department of Criminal Justice and members of Texas Board of Criminal Justice), *abrogated by French*, 120 S.Ct. 2246; *Benjamin*, 172 F.3d at 149-50 (seven class actions by pretrial detainees initially brought against New York City prison officials, including commissioner of corrections), *cert. denied*, 120 S.Ct. 72 (1999); *Hadix v. Johnson*, 133 F.3d 940, 941 (6th Cir.) (inmate class action initially brought against "various state prison officials" in Michigan), *cert. denied*, 524 U.S. 952 (1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 652 (1st Cir. 1997) (class action by pretrial detainees initially brought against Massachusetts prison officials, including Suffolk County sheriff and Massachusetts corrections commissioner), *cert. denied*, 524 U.S. 951 (1998); *Gavin v. Branstad*, 122 F.3d 1081, 1083 (8th Cir. 1997) (inmate class action initially brought against "a number of Iowa state officials"), *cert. denied*, 524 U.S. 955 (1998). Moreover, many of the institutional reform actions to which 18 U.S.C. § 3626 is addressed initially were brought as class actions. *See, e.g.*, *Benjamin*, 172 F.3d at 149-50. By their nature, such aggregated claims target the actions of senior officials, and, indeed, the "prospective relief" that subsequently resulted typically took the form of consent decrees between plaintiffs and elected or appointed state officials or injunctions mandating action at the policymaking levels of the state or local government, not lower level government employees. *See, e.g.*, *id.* (discussing consent decrees that were entered in actions

brought by classes of pretrial detainees in mid-1970s). *See generally* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 12-22 (1997) (discussing the kinds of litigation in the 1970s and 1980s that catalyzed the political and judicial responses that ultimately resulted in the enactment of the PLRA).

We therefore decline the defendants' invitation to blindly import the 18 U.S.C. § 3626(g)(2) definition of "civil actions brought with respect to prison conditions" into 42 U.S.C. § 1997e(a) without regard to context and the distinct statutory purposes that these two provisions advance. *See Carter*, 1999 WL 14014, at *3-4; *Baskerville*, 1998 WL 778396, at *4. *Cf. French*, 120 S.Ct. at 2259 (automatic stay provision of § 3626(e)(2) "must be read not in isolation, but in the context of § 3626 as a whole"). And even to the extent that we may rely upon § 3626(g)(2), it stretches that provision's definition too far to characterize lower level government employees, such as corrections officers, as "government officials," since such a reading of the term "officials" would include just about any government employee without regard to level of responsibility or authority. *See Giannattasio*, 2000 WL 335242, at *12.

An examination of the legislative history of the PLRA suggests the same result. The PLRA's sponsors broadly categorized the bill's provisions as being divided into two major sets of provisions: (1) those aimed at deterring frivolous suits by inmates by raising the cost to prisoners of engaging in "inmate litigation fun-and-games" (garnishment procedure in amendment to *in forma pauperis* provisions; exhaustion provisions; revocation of good-time credits for frivolous suits; prohibition against suing for mental or emotional injury absent showing of physical injury); and (2) those that establish "some tough new guidelines for Federal courts when evaluating legal challenges to prison conditions . . . [in order to] restrain liberal Federal judges who see violations of constitutional rights in every prisoner complaint and who have used these complaints to micromanage State and local prison

systems." 141 CONG. REC. S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Dole, Majority Leader of the Senate). 10 With respect to the first category, floor statements overwhelmingly suggest that the concern over "frivolous" suits in this context refers to subject matter, rather than to the factual merits of a claim that, if proven, would be meritorious. *See, e.g.*, 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch, Chair of Senate Judiciary Committee) (PLRA is designed to "help restore balance to prison conditions litigation and . . . ensure that Federal court orders are limited to remedying *actual violations of prisoners' rights*") (emphasis added); 141 CONG. REC. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham) (providing examples of "frivolous" cases to be prevented as "insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety").

As revealed by this examination of statutory purpose and context, it is clear that particular instances of assault or excessive force were never meant to be included within the ambit of § 3626(g)(2) at all. In context, it makes little sense to apply the definition in § 3626(g)(2) to particular cases of assault or excessive force that do not contemplate ongoing judicial supervision or some other form of "prospective relief" affecting large numbers of inmates-let alone individual claims that complain of past, wholly completed conduct-since § 3626 does not even cover claims for compensatory money damages. *See* 18 U.S.C. § 3626(g)(7) ("the term 'prospective relief' means all relief other than compensatory monetary damages"). In addition to the rather "inept" use of language that would result from the defendants' interpretation, *Booth*, 206 F.3d at 302 (Noonan, J., concurring and dissenting), including particular claims of this sort would do nothing to advance the purpose of the section.

Consideration of the background Eighth Amendment principles against which Congress enacted the PLRA also supports this conclusion. Pre-PLRA Supreme Court

decisions disaggregate the broad category of Eighth Amendment claims so as to distinguish between "excessive force" claims, on the one hand, and "conditions of confinement" claims, on the other. In *Hudson v. McMillian*, for example, the Supreme Court reiterated that because "contemporary standards of decency always are violated" by the malicious and sadistic use of force against prisoners, a less rigorous showing of injury was required for such claims than for conditions of confinement claims, for which "only those deprivations denying the minimal civilized measure of life's necessities" give rise to claims under the Eighth Amendment. 503 U.S. 1, 9 (1992) (internal quotation marks omitted); *see also id.* at 11 ("To deny . . . the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the concepts of dignity, civilized standards, humanity, and decency that animate the Eighth Amendment." (internal quotation marks omitted)); *see also Farmer v. Brennan*, 511 U.S. 825, 835-36 (1994) (distinguishing "excessive force" and "conditions of confinement" claims as being subject to different *mens rea* requirements).

The principles underlying this distinction are equally applicable here. While § 1997e(a) filters through administrative grievance procedures "prison conditions" claims that may be frivolous as to subject matter, the text, structure, purpose, and legislative history of the PLRA provide ample justification for not treating excessive force or assault claims in the same manner. Especially in light of our obligation to construe statutory exceptions narrowly, in order to give full effect to the general rule of non-exhaustion in § 1983 cases, *see City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995); *Patsy v. Board of Regents*, 457 U.S. 496, 508 (1982), we distinguish between "excessive force" and "prison conditions" claims for purposes of exhaustion under § 1997e(a) and conclude that exhaustion of administrative remedies is not required for claims of assault or excessive force brought under § 1983.

CONCLUSION

We hold that Nussle was not required to exhaust DOC's administrative grievance procedures before bringing this action for excessive force and assault. We therefore REVERSE the District Court's judgment and REMAND for reinstatement of Nussle's complaint.

---- Begin EndNotes ----

1 The Attorney General claims that there is not, in fact, any correction officer at CCI named "Willette." Nussle has not, however, withdrawn the action as to this officer.

2 The District Court dismissed Nussle's substantive due process claim as redundant, and Nussle does not advance this claim on appeal.

3 Before the PLRA went into effect, the exhaustion provision of § 1997e(a) read as follows:

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies

(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(2) The exhaustion of remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section or are otherwise fair and effective.

42 U.S.C. § 1997e(a) (1994) (amended 1996).

4 The amended version of § 1997e(a) reads as follows:

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (Supp. 2000) (as amended by PLRA § 803).

5 Since we conclude that Nussle is not obligated to exhaust administrative remedies based on the subject matter of his complaint, we need not address his additional contention that since the DOC administrative grievance procedures make no provision for the award of monetary relief, he is not subject to the exhaustion requirement because there is no administrative remedy "available" to him. We note, however, that other circuits have divided over this issue. *Compare Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000) (exhaustion required); *Massey v. Helman*, 196 F.3d 727 (7th Cir. 1999) (same), *petition for cert. filed*, No. 99-1918 (May 30, 2000); *Wyatt v. Leonard*, 193 F.3d 876 (6th Cir. 1999) (same); *and Alexander v. Hawk*, 159 F.3d 1321 (11th Cir. 1998) (same), *with Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999) (exhaustion not required), *cert. denied*, 120 S. Ct. 787 (2000); *Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998) (same); *and Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997) (same). *Cf. Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 538 (7th Cir. 1999) (Easterbrook, J.) ("It is possible to imagine cases in which the harm is done and no further administrative action could supply any 'remedy.'").

6 In addition, the Fifth and Tenth Circuits have required exhaustion in cases involving excessive force, but without explicitly considering whether such claims properly fall within the § 1997e(a) requirement. *See Wendell v. Asher*, 162 F.3d 887, 890-91 (5th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263, 1264-66 (10th Cir. 1997).

7 As Judge Noonan observes, the only other variant to this definition of "conditions" that is relevant to the term's usage in this statute-"something needing remedy" (as used in the sentence, "Trains were late to New York because of conditions in New Jersey")-suggests the same connotation. WEBSTER'S THIRD INTERNATIONAL DICTIONARY, *supra*, at 473; *Booth*, 206 F.3d at 301 (Noonan, J., concurring and dissenting).

8 Title 18, section 3626(g)(2) of the United States Code provides:

> (g) Definitions.-As used in this section-
>
> . . .
>
> (2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.

18 U.S.C. § 3626(g)(2) (Supp. 1999) (as amended by PLRA § 802).

9 It should be noted that § 3626(g)(2) explicitly excludes "habeas corpus proceedings challenging the fact or duration of confinement in prison" from its reach. 18 U.S.C. § 3626(g)(2). Superficially, this exclusion might suggest that Congress meant to divide the universe of civil actions brought by prisoners into two broad categories-(1) habeas corpus actions challenging the very fact or duration of imprisonment, which are excluded from § 3626; and (2) actions that do not challenge imprisonment as such, but some particular aspect of imprisonment-and meant to include this second category in its entirety. *Cf. McCarthy v. Bronson*, 500 U.S. 136, 139-40 (1991) (relying on similar categorization of prisoners' actions to interpret 28 U.S.C. § 636(b)(1)(B), which authorizes nonconsensual referral of petitions brought by

prisoners to magistrate judges); *Booth*, 206 F.3d at 295 (discussing *McCarthy*).

However, the fact that habeas actions have been excluded from § 3626(g)(2) does not mean that all other claims that might be brought by prisoners are necessarily included by negative implication. Since it is hardly obvious that excessive force and assault claims fall within either of § 3626(g)(2)'s two categories, it remains necessary for us to interpret the breadth of these categories to determine whether such claims fall within the definition of "actions brought with respect to prison conditions"-and indeed, to determine whether § 3626(g)(2) should be relied upon to interpret § 1997e(a) at all.

10 Senator Dole was an original co-sponsor of the PLRA. *See* 141 CONG. REC. S7524 (daily ed. May 25, 1995) (statement of Sen. Dole).

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RONALD NUSSLE :

v. : 3:99cv1091(AHN)

C.O. WILLETTE, ET AL :

RULING ON MOTION TO DISMISS

The plaintiff, Ronald Nussle ("Nussle"), brings this action against the defendants, correctional officer Willette ("Willette") and correctional officer Porter ("Porter"), alleging violations of 42 U.S.C. § 1983,[1/] as well as a state law claim for assault and battery.

1/ Specifically, Nussle alleges violation of his substantive due process rights under the Fourteenth Amendment. He also alleges the use of excessive force by the defendants in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Nussle's substantive due process claim is based on the same facts as his excessive force claim. However, in *Whitley v. Albers*, 475 U.S. 312, 326-27 (1986), the United States Supreme Court recognized that, while the same facts may state a claim under the Eighth Amendment for cruel and unusual punishment as well as a substantive due process claim under the Fourteeneth Amendment, after conviction, "the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection...in cases...where the deliberate use of force is challenged as excessive and unjustified." *Whitley*, 475 U.S. at 327; *see also Meriwether v.*

Now pending before the Court is Porter's motion to dismiss Nussle's entire complaint. For the reasons that follow, the motion [doc. #8] is GRANTED.

STANDARD OF REVIEW

In deciding a motion to dismiss under Rule 12(b)(6), the court is required to accept as true all factual allegations in the complaint and must construe any well-pleaded factual allegations in the plaintiff's favor. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Easton v. Sundram*, 947 F.2d 1011, 1014-15 (2d Cir. 1991). A court may dismiss a complaint only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Still v. DeBuono*, 101 F.3d 888 (2d Cir. 1996). The issue on a motion to dismiss "is not whether the plaintiff will prevail, but whether he is entitled to offer evidence to support his claims." *United Coughlin*, 879 F.2d 1037, 1047 (2d Cir. 1989).

Thus, "any protection [the Fourteenth Amendment] affords convicted prisoners against excessive force is at best redundant of that profided by the Eighth Amendment." *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 1870-71 n. 10 (1989) (explaining that actions which are protected under specific constitutional provisions should be analyzed under those provisions and not under "the more generalized [provisions] of substantive due process"); *see also Whitley*, 475 U.S. at 327 (noting that in the context of excessive force claims, the Due Process Clause provides prisoners no greater protection than the Eighth Amendment). Accordingly, in this case, Nussle's claim will be analyzed solely under the Eighth Amendment, and his claim under the Fourteenth Amendment is dismissed.

States v. Yale New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990) (citing *Scheuer*, 416 U.S. at 236). In deciding such a motion, consideration is limited to the facts stated in the complaint or in documents attached thereto as exhibits or incorporated therein by reference. *See Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991).

FACTS

The plaintiff, an inmate in the custody of the State of Connecticut Department of Correction at Cheshire Correctional Institute ("Cheshire"), both now and at all times relevant to this lawsuit, alleges that the defendants made him the target of a prolonged and sustained pattern of intimidation. (See Pl.'s Compl. ¶¶ 7, 9.) Specifically, Nussle alleges that on June 15, 1996, the defendants, together with other unknown correctional officers, entered his cell, placed him against the wall and, without provocation or justification, proceeded to violently beat him. (*See id.* ¶¶ 10, 11.) Nussle further alleges that the defendants told him he would be killed if he reported the incident. (*See id.* ¶ 12.) Nussle contends that as a result of the alleged assault he suffers from physical and emotional distress. (*See id.* ¶ 13.) He is seeking compensatory and punitive damages as well as attorney's fees and costs of this action.

DISCUSSION

Porter maintains that 42 U.S.C. § 1997e(a) of the Prison Legal Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-73 (1996) ("PLRA"), precludes an inmate from bringing a § 1983 lawsuit in federal court if the inmate has failed to exhaust administrative remedies within the Department of Corrections ("DOC"). Porter asserts that this action is governed by the PLRA because Nussle's claim of excessive force involves prison conditions. He contends that Nussle's failure to file a formal complaint under the DOC's inmate grievance procedures[2/] or to try to

2/ Specifically, Porter maintains that Nussle was required to follow the procedures set forth in the DOC's Administrative Directive 9.6. Subsection 6 of Administrative Directive 9.6 covers matters that are grievable by inmates. It provides that "[a]ny other matter relating to . . . conditions of care or supervision" is grievable through the DOC's administrative procedures (See Administrative Directive 9.6, subsection 9.6.A.5.).

informally resolve it under the DOC procedures[3/] renders his complaint premature and that dismissal is thus required.

In response, Nussle asserts that the exhaustion requirement of the PLRA does not apply in this case because he is not alleging that the conditions of his confinement are unlawful, but is only alleging a violation of his Eighth and Fourteenth Amendment rights. He further contends that exhaustion in this case would be futile because the DOC grievance procedures do not address excessive force claims made by prisoners against officers and because he is seeking compensatory and punitive damages, which cannot be recovered in a DOC grievance hearing.

I. PLRA

42 U.S.C. § 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner...until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The intended purpose of the PLRA was to limit frivolous prisoner lawsuits, which had comprised more than twenty-five percent of all cases filed in the United States District Courts. See 141 Cong. Rec. s7498-01, *7526 (daily ed. May 25, 1995) (statement of Senator Kyl).

3/ Subsection 9 of Administrative Directive 9.6 states that "[a]n inmate shall attempt to seek informal resolution prior to filing an inmate grievance. Informal resolution includes personal contact with the staff able to resolve the matter...."

Although the PLRA requires exhaustion, there is no consensus among the circuits as to the circumstances when exhaustion is required and when it is not required. In fact, the district courts in the Second Circuit are not in agreement on this issue. Specifically, there is a difference of opinion on the two issues that are implicated here: (1) whether the exhaustion requirement applies where the relief requested, i.e., money damages, is not available through the administrative process; and (2) whether cases alleging the use of excessive force are actions "with respect to prison conditions" as that phrase is used in 42 U.S.C. § 1997e(a).

A. Administrative Remedies

Courts are not in agreement as to whether § 1997e(a) applies where prisoners seek money damages and such relief cannot be obtained in the administrative process. *Compare Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999) (discussing the split among circuits on the issue and holding that the inmate was not required to exhaust administrative remedies where remedy sought was not available in prison's administrative system); and *Garret v. Hawk*, 127 F.3d 1263, 1266 (10th Cir. 1997) (holding that § 1997e(a) applies only to the extent that the administrative process provides the relief requested); *with Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532 (7th Cir. 1999) (holding that neither assertion that exhaustion would be futile nor alleged unavailability of administrative remedy negated exhaustion requirement).

The cases which have held that exhaustion is not required reason that an administrative process that does not provide the particular form of relief sought, i.e, money damages, does not proide an "available remedy" within the meaning of § 1997e(a). See *e.g., Perez*, 182 F.3d at 535. In such a case, exhaustion is found to be futile and an unnecessary roadblock to a prisoner's federal claim. *See id.*

The cases which find that exhaustion is required regardless of whether the relief is available focus on the fact that Congress changed the language of § 1997e(a) when the Act was amended in 1996. Prior to the amendment, the Act

provided that prisoners were required to exhaust "plain, speedy and effective" administrative remedies. See *Beeson v. Fishkill Correctional Facility*, 28 F.Supp.2d 884, 892-94 (S.D.N.Y. 1998). Now, § 1997e(a) provides for exhaustion of "available" remedies. See § 1997e(a). Accordingly, this line of cases construe the amendment as requiring exhaustion without regard to whether the remedy is "effective." *See Beeson*, 28 F. Supp.2d at 893. To hold otherwise would essentially reintroduce the requirement that the remedy be "effective," despite the fact that Congress deleted it. *See Vasquez v. Artuz*, No. 97cv8427(JP), 1999 WL 440631 (S.D.N.Y. June 28, 1999). Moreover, because prisoners almost always seek money damages, crafting such an exception would effectively remove the exhaustion requirement entirely.[4/] *See id.* at *6. The Court finds this reasoning persuasive.

In addition, if exhaustion were required only in cases where the relief sought was available, there would be little, if any, effect on the flow of meritless prisoner cases filed in federal court in contravention of Congressional intent. *See* 141 Cong. Rec. s7525 (statement of Sen. Kyl). Moreover, exempting cases that seek money damages from the exhaustion requirement would involve federal courts in the tedious and intrusive process of "evaluat[ing] each cause of action and each type of relief sought in each prisoner's complaint [in order to] determine whether the [relevant administrative system] can grant adequate relief[;]" a result Congress plainly meant to avoid. *See Vasquez*, 1999 WL 440631, *6 *quoting *Alexender v. Hawk*, 159 F.3d 1321, 1326-27 (11th Cir. 1998)) (internal quotations omitted). Consequently, mandatory exhaustion will encourage prisoners to comply with administrative procedures by forcing them to report their complaints to prison officials promptly or risk forfeiture of such claims. *See Beeson*, 28 F.Supp.2d at 895. "In contrast, exempting money damages claims from the [exhaustion] requirement [of § 1997e(a)] would undermine whatever incentive inmates have to report their claims promptly because they could bring an action in federal court any time with[in] the applicable statute of

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4/ In fact, at oral argument, counsel for Nussle conceded this point.

limitations." *Id.* For these reasons, the fact that prisoners cannot recover money damages in an administrative grievance before the DOC is not a sufficient basis to avoid § 1997e(a)'s exhaustion requirement.

B. Excessive Force Claims

Court have also differed about whether cases alleging excessive force are actions "with respect to prison conditions" as that phrase is used in § 1997e(a). *Compare Carter v. Kiernan*, No. 98cv2664, 1999 WL 14014, at *2-4 (S.D.N.Y. Jan. 14, 1999) (holding that Eighth Amendment excessive force claims are not subject to PLRA exhaustion requirement); and *Baskerville v. Goord*, No. 97cv6413, 1998 WL 778396, at *3-6 (S.D.N.Y. Nov. 5, 1998) (holding that exhaustion requirement does not apply to Eighth Amendment excessive force claims); and *White v. Fauver*, 19 F. Supp.2d 305, 312-15 (D.N.J. 1998) (holding the same); with *Beeson v. Fishkill Correctional Facility*, 28 F. Supp.2d 884, 887-96 (S.D.N.Y. 1998) (holding that Eighth Amendment excessive force claims are subject to exhaustion requirement); and *Moore v. Smith*, 18 F.Supp.2d 1360, 1362-63 (N.D. Ga. 1998) (concluding the same).

Although the issue was recently before the Second Circuit, that court has yet to decide it. See *Liner v. Goorde*, No. 98-2925, 1999 WL 734693 (2d Cir. Sept. 22, 1999). In *Liner*, a prisoner brought a § 1983 excessive force claim which the district court dismissed sua sponte before the defendants were served. The court declined to resolve this complex legal issue without the benefit of a more complete record. *See id.*

Nonetheless, even without guidance from the Second Circuit on this complex issue, the Court concludes that the exhaustion requirement applies to cases alleging excessive force. The express lagnage of the PLRA provides for exhaustion of administrative remedies before a prisoner may bring a federal action relating to "prison conditions." *See Beeson*, 28 F.Supp.2d at 887-92. The use of excessive force by correctional officers falls into the category of "prison conditions."

Moreover, there is no support in the legislative history of the PLRA that, as Nussle argues, Congress intended to exempt excessive force claims from the exhaustion requirement. See 141 Cong. Rec. s7525 (statement of Sen. Kyl) (explaining the serious problem regarding the high number of meritless prisoner claims brought in federal court). To the contrary, the legislative history indicates that Congress intended to include excessive force claims within the coverage of § 1997e(a)'s exhaustion requirement. *See Beeson*, 28 F.Supp.2d at 892.

Specifically, there is no reason to believe, nor is there any evidence that Congress actually believed, that excessive force claims are more meritorious than any other category of prisoner litigation. *See Beeson*, 28 F.Supp.2d at 892. Creating an exception for excessive force claims would circumvent the Congressional purpose of weeding out frivolous claims before they are filed in federal court. See id.; *Navarrete v. Metro. Detention Ctr.*, No. 97cv4071, 1999 WL 294875 (E.D.N.Y. March 19, 1999). Thus, efficiency and judicial economy favor exhaustion of all prisoner claims prior to a federal lawsuit being brought.

For these reasons, and in the absence of binding precedent to the contrary, the Court finds that prisoner claims of excessive force under the Eighth Amendment are claims "with respect to prison conditions" and, thus, are subject to § 1997e(a)'s exhaustion requirement. Accordingly, because Nussle has failed to exhaust his remedies before the DOC, the complaint is dismissed.

CONCLUSION

For the reasons stated above, the defendant's Motion to Dismiss (doc. # 8] is GRANTED.

SO ORDERED this 22nd day of November, 1999 at Bridgeport, Connecticut.

/s/Alan H. Nevas
United States District Judge

42 U.S.C. § 1997e. Suits by prisoners

(a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure. The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 3 or 5 of this Act [42 USCS § 1997a or 1997c].

(c) **Dismissal.**

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) **Attorney's Fees**

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that--

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

(B)

(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).

(e) **Limitation on recovery.** No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(f) **Hearings.**

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) **Waiver of reply.**

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) **"Prisoner" defined.** As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.